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IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN DANFORTH,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BENJAMIN J. BUTLER
Office of the State Public Defender
2221 University Avenue SE
Suite 425
Minneapolis, MN 55414
Telephone: 612-627-6980

ATTORNEYS FOR PETITIONER

LORI SWANSON
Minnesota Attorney General
Bremer Tower, Suite 1800
445 Minnesota Street
St. Paul, MN 55101-2134

MICHAEL O. FREEMAN
Hennepin County Attorney
By: MICHAEL K. WALZ
Assistant Hennepin County Attorney
Attorney of Record
C-2000 Government Center
Minneapolis, MN 55487
Atty. License No: 114340
Phone: (612) 348-3115
FAX: (612) 348-6028

ATTORNEYS FOR RESPONDENT

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PROCEDURAL HISTORY

The issue central to this case is whether Petitioner Danforth is entitled to retroactive application of *Crawford v. Washington*, 541 U.S. 36 (2004). Simply put, if Appellant had a matter pending on direct review at the time the *Crawford* decision was issued, he is automatically entitled to relief. If, however, he exhausted his direct review remedies prior to *Crawford's* announcement, he then is entitled to relief only (a) via the application of *Teague v. Lane*, 498 U.S. 288 (1989) and (b) the retroactive application of the *Crawford* rule. With this background, the relevant procedural history is as follows:

March 6, 1996	Appellant was found guilty of Criminal Sexual Conduct in the First Degree.
May 13, 1996	Appellant was sentenced.
August 8, 1996	The State filed a Notice of Appeal of the sentence.
August 9, 1996	Appellant filed a Notice of Appeal contesting the conviction and a motion to consolidate his appeal with the sentencing appeal of the State.
December 16, 1997	Appellant's conviction was affirmed by the Minnesota Court of Appeals. The sentence, however, was reversed and the matter remanded for resentencing. On remand, the district court imposed a double upward durational departure of 316 months.
May 4, 1999	The sentence was affirmed by the Minnesota Court of Appeals.
July 28, 1999	The Minnesota Supreme Court denied Appellant's Petition for Review.

October 26, 1999	Appellant's time to seek United States Supreme Court review expired. *See* 28 U.S.C. § 2101(d).
March 8, 2004	The *Crawford* decision is announced.
July 27, 2006:	The Minnesota Supreme Court rejects retroactive application of *Crawford,* giving rise to the instant Petition for Writ of Certiorari.

The Minnesota Supreme Court summarized the procedural history as follows:

> Stephen Danforth was convicted of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (2004), on March 6, 1996. This conviction arose out of the sexual abuse of J.S., a 6-year-old boy. J.S. was found incompetent to testify at trial, but a videotaped interview of J.S. conducted at a non-profit center was admitted into evidence. On appeal, the court of appeals affirmed Danforth's conviction but remanded for resentencing. *State v. Danforth*, 573 N.W.2d 369, 371 (Minn. App. 1997) (*Danforth I*), *rev. denied* (Minn. Feb. 19, 1998). On remand, Danforth was sentenced to imprisonment for 316 months. The court of appeals affirmed this sentence on appeal. *State v. Danforth,* No. C5-98-2054, 1999 WL 262143, at *1 (Minn. App. May 4, 1999) (*Danforth II*), *rev. denied* (Minn. July 28, 1999). Alleging various trial errors, Danforth filed a petition for postconviction relief. The postconviction court denied the petition and the court of appeals affirmed. *Danforth v. State*, No. C6-00-699, 2000 WL 1780244, at *1 (Minn. App. Dec. 5, 2000) (*Danforth III*), *rev. denied* (Minn. Feb. 13, 2001).
>
> After the Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004),and *Blakely v. Washington*, 542 U.S. 296 (2004), Danforth filed a second petition for postconviction relief alleging he was entitled to relief based on the rules established by those cases. The postconviction court denied Danforth relief, finding that neither *Crawford* nor *Blakely*

applied retroactively to Danforth's case; the court of appeals affirmed. *Danforth v. State*, 700 N.W.2d 530, 532 (Minn. App. 2005) (*Danforth IV*). We granted review of the *Crawford* issue only and requested that the Office of the State Public Defender represent Danforth on this appeal.

Danforth argues that this court is free to apply a broader retroactivity standard than that of *Teague v. Lane*, 489 U.S. 288 (1989), and that he is entitled to the benefit of *Crawford* under *state* retroactivity principles. He also argues that, even using the framework of *Teague*, *Crawford* should be retroactively applied to his case. We reaffirm our holding in *State v. Houston*, 702 N.W.2d 268, 270 (Minn. 2005), that we are required to apply *Teague*'s principles when analyzing the retroactivity of a rule of federal constitutional criminal procedure. Because we conclude that, under *Teague*, *Crawford* does not apply retroactively to Danforth's case, we affirm

Danforth v. State, 718 N.W.2d 451 (Minn. 2006).

FACTUAL HISTORY

The Minnesota Court of Appeals summarized the facts of this case as follows:

> Danforth is a multiply-convicted pedophile with an extensive history of sexually abusing young boys during the 1970's and 1980's. Danforth and (victim) J.S.' parents, particularly J.S.' father, were close friends for many years; Danforth was like a "favorite uncle" to J.S. and his siblings, having spent a great deal of time with the family.
>
> On August 11, 1995, a neighbor discovered six-year-old J.S. with his pants down atop a younger girl, acting in a sexual manner. When confronted by his mother and asked where he had learned such things, J.S. said that "Steve" had put his mouth on J.S.' "pee-pee" and his finger in J.S.' "poopie butt." That evening, J.S.' mother called the police to report the alleged sexual abuse.
>
> When interviewed by the police, J.S. said that "Steve" had put his "pee" in his buttocks and that "Steve" had made him "kiss his pee." On August 23, 1995, J.S. was interviewed at CornerHouse, a non-profit sexual abuse center. J.S. gave substantially similar information during this videotaped interview and clearly indicated that he had been sexually abused by Danforth.
>
> The trial was lengthy, lasting from February 7 through March 6, 1996. Danforth, a disbarred attorney, represented himself for much of the trial, although he had access to stand-by counsel.
>
> On the day that testimony was scheduled to begin, a competency hearing was held to determine whether J.S. and his five-year-old sister, A.S., were competent to testify. Danforth strongly urged the district court to find J.S. incompetent and to rule the CornerHouse videotape inadmissible. The state agreed that J.S. appeared incompetent to testify, but argued that the videotape was nevertheless admissible. Because J.S.

had limited ability to focus on questions and give relevant answers, the district court declared him incompetent. The district court found A.S. competent to testify, however, because she exhibited a far superior ability to concentrate than J.S.

The district court admitted the videotape because it found the taped conversations bore sufficient indicia of reliability. Among other factors, the district court noted that J.S.' remarks appeared spontaneous and largely unsolicited by leading questions, and that J.S. lacked any apparent motivation to fabricate the accusation.

At trial, the jury viewed the CornerHouse videotape, and A.S. testified that she had seen "Steve" put his mouth on J.S.' "pee-pee" and "private" one day in the men's room by the pool at their aunt's apartment. A.S. did not identify Danforth in the courtroom, however. The state called former victims to testify about the sexual abuse underlying some of Danforth's previous convictions.

Danforth testified on his own behalf. He claimed that J.S.' parents trumped up the charges because J.S.' father was repulsed by Danforth's admitted homosexuality and J.S.' mother was angry with Danforth for various disparaging comments and criticism of her parenting skills. Danforth also claimed that he was reformed and understood the evil of his past ways.

The jury convicted Danforth of first-degree criminal sexual conduct. The district court denied Danforth's detailed motion for a new trial and sentenced him to an executed term of imprisonment of 216 months, and upward durational departure of 58 months, but less than double the presumptive sentence, which the state asserted was the minimum sentence required under Minn. Stat. § 609.1352 (the patterned sex offender statute).

State v. Danforth, 573 N.W.2d 369 (Minn. App. 1997), *rev. denied* (Minn. Feb. 19, 1998).

ARGUMENT

"The history of American freedom is, in no small measure, the history of procedure"

Justice Felix Frankfurter

Malinski v. New York
324 U.S. 401, 65 S. Ct. 781, 89 L.Ed. 1029 (1945)

The observation of Justice Frankfurter could have been written with the instant matter in mind. Decidedly, *Danforth v. Minnesota* presents a single issue of procedural law significant not only to the many convicted persons whose convictions, at least in part, rest upon the admission of "reliable hearsay," but as well to the judges and prosecutors of the fifty states, charged as they are with the duty of ensuring that due process remains, as it must, a protective umbrella over each and every criminal prosecution. The answer to the question of whether the rule enunciated in *Crawford v. Washington,* 541 U.S. 36 (2004) is to be afforded retroactive application promises an immediate and, depending upon that answer, immense impact upon criminal procedural law in the United States.

I. PETITIONER IS NOT ENTITLED TO RETROACTIVE APPLICATION OF THE *CRAWFORD* RULE; ACCORDINGLY, HIS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

While the various Circuit Courts of Appeal do not speak with unanimous voice as to the retroactive application of the *Crawford* rule, those that have commented upon the subject do agree that *Crawford* announces a new rule of constitutional criminal procedure. Because the announcement of a "new rule" is essential to the application of *Teague v. Lane*, 489 U.S. 288 (1989), any analysis of the question of retroactivity must begin with a determination of whether *Teague*, infact, applies.

A. *Crawford* Announced A New Rule.

Under *Beard v. Banks*, 542 U.S. 406, 413 (2004), a rule is new when it is not dictated by the law in effect at the time of the defendant's conviction. A poll of the Circuit Courts of Appeal reveals that they speak with unanimity in the belief that *Crawford* did, in fact, announce a new rule and that *Teague v. Lane* is applicable to the analysis of the question of *Crawford's* retroactive application.

As the Fifth Circuit observed in *Lave v. Dretke*, 444 F.3d 333 (5th Cir. 2006), "[b]ecause *Crawford* changed the test for the admissibility of certain out-of-court statements, it imposes new obligations on state and federal courts and qualifies as a new rule of criminal procedure."

That view was reiterated by the Seventh Circuit Court of Appeals in *Bintz v. Bertrand*, 403 F.3d 859 (7th Cir. 2005), a case of some significance to Minnesota as it arose in Minnesota's sister state, Wisconsin. *Bintz* concludes that

the U.S. Supreme Court announced a new rule for Confrontation Clause objections but that the rule has no retroactive application. In so doing, the Seventh Circuit stated:

> It seems clear that *Crawford* was a clean break from the line of precedent established by *Roberts*. *Crawford* considered and rejected the continuing application of *Roberts*. Nevertheless, a state court would not have acted unreasonably by failing to anticipate this ruling and applying *Roberts*. *Crawford* was thus a new rule for purposes of *Teague* (citations omitted).

Bintz v. Bertrand, 403 F.3d at 866.

Even the Ninth Circuit, being the sole proponent of *Crawford's* retroactive application among the Circuit Courts of Appeal, begins its analysis with the declaration that *Crawford* imposed a new rule, albeit not by the standard enunciated in *Teague*. Moreover, the rule announced in *Beard v. Banks* has not been met. As the Seventh Circuit Court of Appeals observed in *Murillo v. Frank*, 402 F.3d 786 (7th Cir. 2005), "*Crawford* was not 'dictated by *Roberts* *** it broke from it. That the break takes the form of a return to an older, less flexible but historically better grounded approach does not make it less a break."

Perhaps one of the better summaries of why *Crawford* establishes a new rule is found in *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. September 8, 2004).

> A decision of the Supreme Court announces a new rule if "the result was not dictated by precedent existing at the time defendant's conviction became final" (citations omitted). As we explained above, prior to the decision in *Crawford*, *Roberts* provided the appropriate framework for determining whether the admission of hearsay statements violated the Confrontation Clause. The Supreme Court itself noted that the logic of *Roberts* was inconsistent with the

> Court's conclusion in *Crawford* that the Confrontation Clause requires an opportunity to cross-examine before testimonial hearsay may be admitted against the defendant (citations omitted). Thus, *Roberts* and its progeny did not dictate the result in *Crawford* and we conclude that it announces a new rule of constitutional law.

Brown v. Uphoff, 381 F.3d at 1226

Interestingly, it is also clear that Chief Justice Rehnquist and Justice O'Connor believed that *Crawford* announced a new rule. In the concurrence/dissent of the Chief Justice, to which Justice O'Connor joined, it is stated:

> ...in making this appraisal, doubt that the new rule is indeed the "right" one should surely be weighed in the balance.
>
> * * *
>
> But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists ... is covered by the new rule.

Crawford, 124 S. Ct. at 1378

> Indeed, then, there can be little dispute that *Crawford*, by overruling the *Ohio v. Roberts*, 448 U.S.56, 65 L.Ed.2d 597, 100 S. Ct. 2531 (1980) manner of determining whether the admission of hearsay evidence violates the Sixth Amendment, created a new rule.

Often, there is more than one path through a forest, and the Minnesota Supreme Court, joined by the Seventh Circuit, elected the path less traveled to explain that *Crawford* announces a new rule.

The Minnesota Supreme Court observed:

> Danforth's argument is flawed because it misconstrues the test governing whether a rule is new for *Teague* purposes. We do not ask whether *Crawford's* rule is faithful to the original meaning of the Confrontation Clause or whether the results of relevant Supreme Court precedent are consistent with the rule in *Crawford*. Instead, we ask "whether 'reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt *compelled* (emphasis in original) by existing precedent to rule in his favor'" (citations omitted). Put another way, Danforth's argument requires "reasonable jurists" to have foreseen *Crawford's* significant modification—if not outright overruling—of *Roberts*. When conducting an analysis under *Teague*, the Supreme Court has never required such prescience of lower courts. Furthermore, such a requirement would not "validate reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions" (citations omitted). Consequently, *Crawford* established a new rule of federal constitutional criminal procedure for the purposes of *Teague*.

Danforth v. State, 781 N.W.2d at 459.

The Seventh Circuit, following the same path, stated:

> It seems clear that *Crawford* was a clean break from the line of precedent established by *Roberts*. *Crawford* considered and rejected the continuing application of *Roberts*. Nevertheless, a state court would not have acted unreasonably by failing to anticipate this ruling and applying *Roberts*. *See O'Dell v. Netherland*, 521 U.S. 151, 156, 138 L.Ed.2d 351, 117 S. Ct. 1969 (1997). ("At bottom, the *Teague* doctrine 'validates reasonable good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" (citations omitted in original). *Crawford* was thus a new rule for purposes of *Teague*.

B. *Crawford's* Rule Is Procedural.

It is next necessary to examine whether *Crawford's* new rule is procedural, as opposed to substantive, law. This is because *Teague v. Lane* does not apply to substantive changes in the law, but, rather, to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard v. Banks,* 542 U.S. at 417 (quoting *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997)).

A rule imposes a substantive change when it "...alters the range of conduct or the class of persons that the law punishes," while a procedural rule is one which addresses "the manner of determining the defendant's culpability." *Schriro v. Summerlin,* 542 U.S. 348 at 353 (2004).

Decidedly, a rule requiring, as *Crawford* does with very limited exception, confrontation and cross-examination in lieu of reliable hearsay, addresses the way in which a defendant's culpability is to be proven in opposition to addressing the creation of a new crime or a new class of offenders. In fact, *Crawford* declares that the necessity of cross-examination is "a procedural rather than a substantive guarantee." *Crawford,* 541 U.S. at 61. Accordingly, *Crawford* announced a new rule of criminal procedural law. As such, *Teague* is applicable to the analysis of the retroactivity issue.

C. *Crawford's* New Rule Is Not A "Watershed Rule" And Does Not Require Retroactive Application.

1. The Rule of *Teague v. Lane.*

In *Teague v. Lane,* 489 U.S. 288, 301 (1989) this Court held:

> In general...a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government .... To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Teague allows for retroactive application of a new law in only two instances: (1) where a new substantive law places certain kinds of primary, private individual conduct beyond the power of the criminal-making authority to proscribe, and (2) where a new procedural rule defines procedure implicit in the concept of ordered liberty. A new rule qualifies under the second exception if it is a "watershed" rule that implicates fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. at 307.

As Senior Judge Wallace explains in his *Bockting* concurrence/dissent, *Crawford's* new rule applies retroactively only if it falls within certain categories of rules. In *Schriro v. Summerlin*, 542 U.S. 348 (2004), this Court provided the following guidance:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, [citations omitted] as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish, [citations omitted]. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose on him. [citations omitted].
>
> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that

> someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect only to a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." [citations omitted].

Schriro v. Summerlin, 542 U.S. at 351-52.

Judge Wallace concludes, "Measured against *Summerlin's* standards, *Crawford* is best classified as a procedural rule." Wallace concurrence/dissent, *Bockting v. Bayer* at 2021.

2. *Crawford* Is Not A "Watershed" Rule.

The prototypical example of a watershed rule is *Gideon v. Wainwright,* 372 U.S. 335 (1963) which established an affirmative right to counsel in felony cases. It is against this standard that the Circuit Courts of Appeal have measured *Crawford,* and, with the single exception of the Ninth Circuit, have found it lacking. This is because a rule is classified as a "watershed" rule only if it meets two tests: The first is that "[i]nfringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction." The second is that the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain,* 533 U.S. 656 (2001), (citing *Sawyer v. Smith,* 497 U.S. 227, 242 (1990), and *Mackey v. United States,* 401 U.S. 667, 693 (1971)).

a. *Crawford* Did Not Improve The Overall Accuracy Of The Criminal Process.

The *Crawford* court noted that while the goal of the Confrontation Clause was to improve reliability, it was a procedural guarantee.

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford v. Washington, 541 U.S. at 61-62.

In *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004), the Second Circuit Court of Appeals identified *Teague's* second exception as being "new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding and improve the accuracy of the criminal process." Applying that requirement to *Mungo*, the Second Circuit concluded:

> We do not believe that *Crawford* necessarily improves the overall accuracy of the criminal process. As we see the operation of the *Crawford* rule, it is likely to improve accuracy in some circumstances and diminish it in others. To the extent that *Crawford* requires the exclusion of unreliable hearsay that would have been admitted under the prior law, it is likely to improve accuracy. *** At the same time, however, *Crawford* also precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under the old rules. In such instances, juries will be deprived of highly reliable evidence of guilt, and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries. *** Where the testimony was admissible under the old rules precisely because it was

> reliable, these applications of *Crawford* will diminish, rather than increase, the accuracy of the process. *** Because *Teague's* test of a watershed rule requires improvement in the accuracy of the trial process overall, we conclude that *Crawford* is not a watershed rule. We thus conclude that *Crawford* should not be applied retroactively on collateral review.

Mungo v. Duncan, 393 F.3d at 336.

The Fifth Circuit, in *Lave v. Dretke,* 444 F.3d 333 (5th Cir. 2006), concisely concludes, "[t]he point of *Crawford* is not that only live testimony is reliable, but that the Sixth Amendment gives the accused a right to insist on live testimony, whether that demand promotes or frustrates accuracy." Quoting *Mungo,* the Court continued, "[b]ecause *Teague's* test of a watershed rule requires improvement in the accuracy of the trial process overall, we conclude that *Crawford* is not a watershed rule ... [and] should not be applied retroactively." *Mungo v. Duncan,* 393 F.3d at 336.

In *Murillo v. Frank*, 402 F.3d 786 (7th cir. 2005), another case arising from Minnesota's sister state, Wisconsin, the Seventh Circuit stated:

> Indeed, it would be a close question whether *Crawford* helps or hinders accurate decisionmaking. Live testimony is preferable to affidavits and transcribed confessions, because cross-examination can probe its weaknesses, but recorded testimony may be better than silence, when death or incapacity or threats or loyalty to one's confederates keep witnesses off the stand. The point of *Crawford* is not that only live testimony is reliable, but that the Sixth Amendment gives the accused a right to insist on live testimony, whether that demand promotes or frustrates accuracy. Like the self-incrimination clause and other provisions in the Bill of Rights, the confrontation clause can be invoked to prevent the conviction of persons who are guilty in fact. What *Crawford* holds is that defendants enjoy

> this right *even when the hearsay is trustworthy* (emphasis in original). This is not an indispensable innocence-protecting decision that must be applied retroactively to criminal prosecutions that have already been finally resolved on direct review.

Murillo v. Frank, 402 F.3d at 790-91.

The Seventh Circuit joined the debate in *Bintz v. Bertrand*, where that Court concluded:

> Further, it is unclear that *Crawford's* modification to the hearsay rules will markedly improve the accuracy of convictions. *Crawford* is not a guarantee of accuracy but an extension of the full constitutional protections of the Sixth Amendment. While the two concepts overlap, they are not synonymous. *Crawford,* therefore, is not a watershed change for purposes of the second *Teague* exception and does not apply retroactively.

Bintz v. Bertrand, 403 F.3d at 867.

In *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), the Ninth Circuit expressed the minority view that *Crawford* should be retroactively applied. The State of Minnesota, however, respectfully suggests that Judge Wallace, the Senior Judge of that Circuit, arrived at the correct result in his thoughtful concurrence/dissent:

> Nor am I prepared to assert that all testimonial hearsay evidence admitted without the opportunity for cross-examination necessarily renders a criminal trial "impermissibly inaccurate" (citation omitted), or otherwise "unfair."

Bockting v. Bayer, 399 F.3d at 1027.

The foregoing reasoning is sound. Moreover, this Court, in articulating its foundation for the *Crawford* decision, did not suggest that evidence introduced under *Roberts* was of diminished accuracy, but, rather, that:

> ...the Framers would not have allowed admission of testimonial statements of a witness who did not appear at the trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.

Crawford v. Washington, 541 U.S. 36 at 53-54.

Similarly, although this Court criticized *Roberts'* unpredictability (541 U.S. at 63), that criticism was unaccompanied by the conclusion that the application of *Roberts* necessarily resulted in diminished accuracy.

Thus, the syllogism giving rise to the conclusion that *Crawford* is not retroactive becomes apparent: (a) If the law requires that for a watershed rule to exist, infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and (b) if application of the rule of *Roberts* did not diminish that likelihood and *Crawford* did not enhance it, then (c) *Crawford* simply cannot be a watershed rule.

A second syllogism then, becomes immediately applicable: (a) If Petitioner Danforth's request for retroactive application of the *Crawford* rule requires a finding that *Crawford* is a watershed rule, and (b) *Crawford* is not a watershed rule, then (c) Petitioner Danforth's prayer for retroactive application of *Crawford* must fail.

D. Because Confrontation Clause Violations Are Subject To Harmless Error Analysis, *Crawford* Is Not A Watershed Rule Entitled To Retroactive Application.

In *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004), it is observed that although this Court "referred to the protections of the Confrontation Clause as a 'bedrock procedural guarantee,'" *Crawford*, 124 S. Ct. at 1359, such reference "does not necessarily suggest that the rule set forth in *Crawford* is 'on the magnitude of the rule announced in *Gideon v. Wainwright* as it must be to fit within the *Teague* exception.'" *Brown*, 381 F.3d at 1226. The Tenth Circuit continued, stating that because "Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial," (citation omitted) "[i]t would ... be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process." *Brown*, 381 F.3d at 1226-27. Relying in part upon that analysis, the 10th Circuit concluded that *Crawford* was not a watershed decision and, therefore, was not retroactively applicable.

Because Confrontation Clause violations are subject to harmless error review (*see Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988)), *Crawford* does not enjoy the primacy and centrality of the *Gideon* rule. Indeed, the fact that *Crawford* errors are subject to harmless error review is a primary and central reason why *Crawford* should not be retroactively applied.

It is absolutely inconceivable that any appellate tribunal, even when presented with overwhelming, non-hearsay evidence of guilt, would sustain a conviction obtained in violation of a criminal defendant's right to counsel as

guaranteed by *Gideon v. Wainwright*. However, it is nonetheless true that if confronted with the same quantum of non-hearsay evidence, the same tribunal, exercising the harmless error rule, could legitimately sustain a conviction over the objection that hearsay evidence had erroneously been allowed.

In *Brown v. Uphoff*, the Tenth Circuit similarly took note of the effect of the harmless error rule:

> Unlike *Gideon*, *Crawford* does not "alter [] our understanding of what constitutes basic due process," *Mora*, 293 F.3d at 1219, but merely sets out new standards for the admission of certain kinds of hearsay. Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial. *Crespin v. New Mexico*, 144 F.3d 641, 649 (1988). It would, therefore, be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process. *See Mora*, 293 F.3d at 1219 (holding that *Apprendi v. New Jersey* did not alter fundamental due process rights, in part because *Apprendi* errors could be excused given overwhelming evidence). Accordingly, we conclude that *Crawford* is not a watershed decision and is, therefore, not retroactively applicable to Brown's initial habeas petition.

Brown v. Uphoff, 381 F.3d at 1226-27.

CONCLUSION

Chief Justice Rehnquist, joined by Justice O'Connor in a concurrence/dissent to *Crawford*, adhere to the view that *Crawford* has only prospective application.

> Though there are no vested interests involved, unresolved questions for the future of everyday criminal trials throughout the country surely counsel the same sort of caution. The Court grandly declares that "[w]e leave for another day any effort to spell out a comprehensive definition of "testimonial." But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists ... is covered by the new rule. They need them now, not months or years from now.

Id. at 1378.

While it is clear that the Chief Justice and Justice O'Connor were greatly concerned as to the prospective impact of the *Crawford* decision as it pertained to the definition of "testimony" it is interesting to note that nowhere in their concurrence/dissent is there to be found any mention of the impact that retroactive application of the *Crawford* rule would visit upon courts and prosecutors throughout the fifty states. It is tempting to suggest that the negative implication of that omission is that neither Justice, even in their most innovative imaginings, conceived of a day when *Crawford* would be a retroactive recourse available to anyone whose conviction rested, at least in part, upon testimonial hearsay. Fortunately, we need not rest upon such speculation. The examination of retroactive application of the *Crawford* rule undertaken by the several Circuit

Courts of Appeal provides suitable discussion. All that remains is for this Court, as it must, to agree.

Accordingly, the State of Minnesota requests that this Court deny Mr. Danforth's Petition for Writ of Certiorari. In the alternative, the State of Minnesota joins Petitioner in the suggestion that the writ be granted but the matter be stayed, pending resolution of *Whorton v. Bockting*, ___ U.S. ___, 126 S. Ct. 2017 (2006) (U.S. Supreme Court File # 05-595), which presents exactly the same issue.

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Respectfully submitted,

LORI SWANSON
Minnesota Attorney General
Bremer Tower, Suite 1800
445 Minnesota Street
St. Paul, MN 55101-2134

MICHAEL O. FREEMAN
Hennepin County Attorney

By: Michael K. Walz
Assistant County Attorney
Attorney License No. 114340
C-2000 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-3115
FAX: (612) 348-6028

ATTORNEYS FOR RESPONDENT